



July 3, 2001

Mr. Miles T. Bradshaw
Senior Assistant General Counsel
Houston Independent School District
3830 Richmond Avenue
Houston, Texas 77027-5838

OR2001-2847

Dear Mr. Bradshaw:

On behalf of the Houston Independent School District (the "district"), you ask this office to examine Open Records Letter No. 2001-1454 (2001). You believe that this office failed to address all properly submitted comments and therefore erroneously concluded that certain information submitted to the district by Health Management Corporation ("HMC") must be released. Your request was assigned ID# 149061. Where this office determines that an error was made in the decision process under sections 552.301 and 552.306, and that error resulted in an incorrect decision, we will correct the previously issued ruling.

In ORL 2001-1454, this office concluded that requested information that was submitted to the district by HMC must be released to the public based on HMC's failure to submit arguments that this information is excepted from required public disclosure. Our records indicate that HMC did timely provide such comment. We shall therefore examine the arguments presented by HMC for the information that it contends is excepted from disclosure.

HMC contends that certain information it submitted to the district is excepted from disclosure by section 552.110 of the Government Code. Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).¹ This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990). Upon review of the arguments submitted by HMC, we conclude that HMC has not established that any of the information it seeks to withhold is protected as a trade secret, and therefore, none of the information may be withheld under section 552.110(a).

Section 552.110(b) excepts from disclosure commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. To withhold information under this exception, the business enterprise whose information is at issue must make a specific factual or evidentiary showing, rather than conclusory or generalized

¹The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

allegations, that substantial competitive injury would result from disclosure of the information. See Open Records Decision No. 661 at 5-6 (1999); see also *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). Also note that in applying the predecessor statute to section 552.110, this office has held that material that is essentially technical in nature and that relates to the substance of a proposal may ordinarily be withheld under this exception, while information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing ordinarily may not. Open Records Decision No. 319 (1982).

From our review of the subject information and the comments of HMC, we conclude that HMC has demonstrated that substantial competitive injury would result to it from disclosure of several portions of the information it seeks to withhold. We have marked with yellow flags the information to be withheld under section 552.110(b) of the Government Code. All other information provided by HMC that is responsive to the request must be released.

We note that HMC seeks to withhold certain information contained in pages 49, 50, 51, 52, 53 and 55 of its proposal. The district did not submit these pages to this office.² Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office the information required by section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information that overcomes this presumption. See *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body or third party must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Because the district has not submitted pages 49, 50, 51, 52, 53 and 55 of the HMC proposal, we have no basis for determining whether a compelling reason exists for withholding information within these pages. Thus, we have no choice but to order the information released pursuant to section 552.302. If either the district or HMC believes the information is confidential and may not lawfully be released, the ruling must be challenged in court as outlined below. We caution that the distribution of confidential information constitutes a criminal offense. See Gov't Code § 552.352.

Open Records Letter No. 2001-1454 is overruled to the extent it conflicts with this ruling. This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days.

²Although the pages of the submitted proposal jump from page 48 to page 62, we note that page 48 of the proposal is Bates-stamped number 000050 and page 62 is Bates-stamped number 000051.

Id. § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink that reads "Michael A. Pearle". The signature is written in a cursive, flowing style.

Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/seg

Ref: ID# 149061

Encl: Submitted documents

cc: Mr. S. Owen Hunt
Deputy General Counsel
Trigon Blue Cross Blue Shield
P.O. Box 27401
Richmond, Virginia 23279
(w/o enclosures)

Mr. Douglas C. Shibut, Coordinator
Marketing & Communications
Health Management Corporation
6800 Paragon Place
Richmond, Virginia 23230
(w/o enclosures)